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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 27 Original

STATE OF OHIO ..... PLAINTIFF

V.

STATE OF KENTUCKY ..... DEFENDANT

REPLY OF THE STATE OF KENTUCKY TO EXCEPTIONS OF THE STATE OF OHIO TO THE REPORT OF THE SPECIAL MASTER FILED MAY 15, 1972

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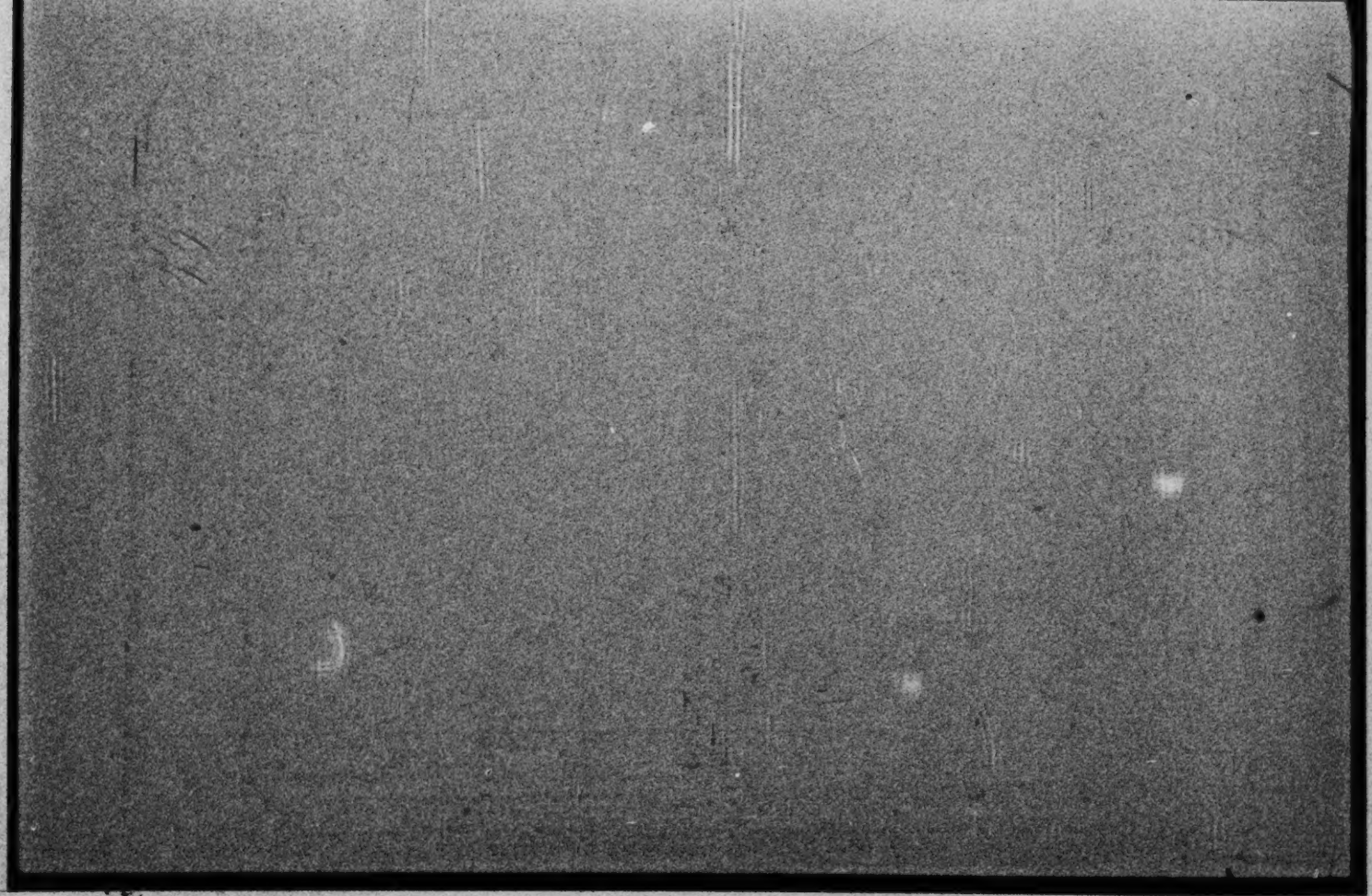

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ARGUMENT

I. THE REPORT OF THE SPECIAL MASTER FILED MAY 15, 1972 CORRECTLY HELD THAT THE FACTUAL ALLEGATIONS OF THE PROPOSED AMENDED COMPLAINT FAILED AS A MATTER OF LAW TO STATE A CAUSE OF ACTION.

IIa. THE PETITION FOR LEAVE TO AMEND THE COMPLAINT SHOULD BE DENIED WHERE THE FACTUAL ALLEGATIONS OF THE PROPOSED AMENDMENT, CONSIDERED UNDER THE MOST LIBERAL PRINCIPLES OF PRACTICE AND PLEADING, ARE LEGALLY BASELESS AND FAIL TO STATE A CAUSE OF ACTION.

IIb. THIS COURT HAS AUTHORITATIVELY DECIDED THAT THE BOUNDARY OF KENTUCKY WITH THE STATES BORDERING IT ON THE OHIO RIVER EXTENDS TO THE LOW WATER MARK ON THE NORTHERN SHORE OF THAT RIVER.

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IN THE

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OCTOBER TERM, 1965

No. 27, Original

STATE OF OHIO ..... *Plaintiff*

v.

STATE OF KENTUCKY ..... *Defendant*

QUESTIONS PRESENTED

I. WHETHER THE REPORT OF THE SPECIAL MASTER FILED MAY 15, 1972 CORRECTLY HELD THAT THE FACTUAL ALLEGATIONS OF THE PROPOSED AMENDED COMPLAINT FAILED AS A MATTER OF LAW TO STATE A CAUSE OF ACTION.

IIa. WHETHER THE PETITION FOR LEAVE TO AMEND THE COMPLAINT SHOULD BE DENIED WHERE THE FACTUAL ALLEGATIONS OF THE PROPOSED AMENDMENT, CONSIDERED UNDER THE MOST LIBERAL PRINCIPLES OF PRACTICE AND PLEADING, ARE LEGALLY BASELESS AND FAIL TO STATE A CAUSE OF ACTION.

IIb. WHETHER THIS COURT HAS AUTHORITATIVELY DECIDED THAT THE BOUNDARY OF KENTUCKY WITH THE STATES BORDERING IT ON THE OHIO RIVER EXTENDS TO THE LOW WATER MARK ON THE NORTHERN SHORE OF THAT RIVER.

IIc. WHETHER OHIO HAS ACQUIESCED IN THIS COURT'S DECISIONS RECOGNIZING THE LOW WATER MARK ON THE NORTHERN SHORE OF THE OHIO RIVER AS THE NORTHERN BOUNDARY LINE OF KENTUCKY.

This original action was initiated in 1980 when the State of Ohio filed its complaint in which it requested a declaration as to the location of the low-water mark on the northern shore of the Ohio River between Kentucky and Ohio.

In that complaint Ohio claimed that it "does now, and has always claimed and maintained that the boundary between it and the State of Kentucky is the northerly low-water mark of the Ohio River, as that mark existed in the year 1792 when Kentucky became a state . . ." (Ohio's original Complaint, hereafter referred to as "C. ").

In support of this claim, Ohio stated that this Court had judicially determined in the cases of *Handly's Lessee v. Anthony*, 18 U. S. 374 (1820); and *Indiana v. Kentucky*, 136 U. S. 479 (1890), that the boundary between the two states was the low water mark on the northern shore of the Ohio River.

Ohio further contended in its complaint that, "the determination of the boundary between Indiana and Kentucky "as the northerly low-water mark of the Ohio River, as that mark existed in 1792, should control in this dispute between Ohio and Kentucky because of the identical title relationship of the parties hereto" (C. 12).

On January, 1981, Ohio moved the Court for leave to file an amended complaint, stating in addition its contention that the low-water mark on the southern shore is the boundary between the two states as had been judicially determined by this Court in *Handly* and *Indiana v. Kentucky*.

In its amended complaint, Ohio seeks to establish the middle of the Ohio River as the boundary between the two states. To support this completely new claim, Ohio sets out matters allegedly occurring prior to the Revolutionary War.

On November 2, 1981, this Court entered an order referring the motion to the Special Master.

On April 10, 1972, the Special Master submitted his Report to this Court. The Report recommends that an order be entered denying the motion to amend the complaint of the State of Ohio (The Report of the Special Master, hereafter referred to as "Rep", 16).

In explaining on the basis for his recommendation, the Special Master stated:

> "In light of the decisions of the Supreme Court and those of the Ohio Supreme Court recognizing and accepting the northern boundary of Kentucky at the low water mark on the northern shore of the River, and on the basis of Kentucky's open and continuous assertion and exercise of dominion to that point without formal objection by Ohio for more than 150 years, it is my opinion that the pronouncement of the Court in *Indiana v. Kentucky* applies equally to Ohio, and it has for all practical purposes acquiesced in Kentucky's claim of sovereignty over the River to the low water mark on the northern shore." (Rep. 15)

The Special Master concluded that the proposed amendment, "*in any view of its factual allegation*, fails as a matter of law to state a cause of action." (Rep. 16) (Emphasis added.)

ARGUMENT

I.

THE REPORT OF THE SPECIAL MASTER FILED MAY 15, 1972 CORRECTLY HELD THAT THE FACTUAL ALLEGATIONS OF THE PROPOSED AMENDED COMPLAINT FAILED AS A MATTER OF LAW TO STATE A CAUSE OF ACTION.

The State of Ohio takes exception to the Report of the Special Master which concluded that the factual allegations of the proposed amended complaint failed, as a matter of law, to state a cause of action (Exceptions p. 1). Ohio bases its except-

...ing upon valid considerations. The first is that the State of Kentucky has also raised an attack upon the sufficiency of the allegations in the complaint, but chooses to assert a technical defense only as opposed. The second basis relied upon by Ohio is that the factual allegations clearly state a cause of action due to a series of events which allegedly affected Virginia's title to the territory south and west of the Ohio River.

These contentions are ably argued and will be discussed in the order as presented herein.

We submit that the State of Kentucky did in fact raise an attack upon the sufficiency of the allegations as shown by its brief in opposition to the motion before the Court, wherein it succinctly stated:

"Kentucky candidly recognizes the proposition made in the original complaint that the north shore has always been the boundary between the states was settled by a series of cases in this Court (Brief in support of complaint, page 14), but has now to submit, through its pleadings, that the Ohio River is not the boundary but on the middle of the river (Id. pp. 17). Kentucky submits that this contention is legally baseless."

Moreover, Kentucky has not asserted a *technical defense* as Ohio claims rather she has relied upon an acquiescence of over 150 years by the State of Ohio to the boundary of Kentucky as established at the low water mark on the northern shore. In *Michigan v. Wisconsin*, 270 U. S. 295 (1926), cited by the Special Master at page 15 of his report, the Court stated:

"The rule, long applied and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of jurisdiction over it is conclusive of the

Furthermore, there is authority for the proposition that all affirmative defenses can be presented by a motion, such as

a motion to dismiss. The United States Court of Appeals for the Third Circuit has so held in the case of *Williams v. Murdock*, 330 F.2d 745 (3rd Cir. 1964), although this is only persuasive authority for this Court.

In addition to the above, the Special Master concluded after an examination of the allegations themselves that they failed as a matter of law to state a cause of action. Such a conclusion is, in and of itself, dispositive of Ohio's assertion that Kentucky has not challenged the sufficiency of the new allegations to state a cause of action.

Ohio also claims that a cause of action was clearly established due to a series of events which affected the State of Virginia's title to the territory north and west of the Ohio River. To argue "who held what" or "who did what" prior to the American Revolution adds nothing to the matter at hand, but only confuses the issues facing this Court. As was stated in our brief in opposition to Ohio's motion for leave to file an amended complaint at p. 3:

> "Ohio now argues that certain alleged treatments of subject territory by the British Crown and others prior to the American Revolution indicate that the territory was not a part of Virginia and that the reasoning of the Supreme Court cases referred to above is therefore unsound. However, assuming for the sake of argument that it could be contended that the subject territory was not a part of Virginia prior to the American Revolution, that would not detract from the reasoning of the decisions referred to above. After the American Revolution, all of the territory involved in this controversy was a part of the whole territory of the sovereign United States of America. It was pursuant to congressional action of the sovereign United States of America and the action of the Commonwealth of Virginia included within it that the subject territory was ceded to the United States Government and subsequently became in part the State of Ohio. The State of Ohio was created by law of the sovereign United States of America. The

[redacted]

dispute between Kentucky and Ohio. Accordingly, the Special Master was correct when he recommended that an order be entered denying the petition to amend the complaint of the State of Ohio (Rep. 6). See Argument I of our reply, pp. 5-6.

II.

THIS COURT HAS AUTHORITATIVELY DECIDED THAT THE BOUNDARY OF KENTUCKY WITH THE STATES BORDERING IT ON THE OHIO RIVER EXTENDS TO THE LOW WATER MARK ON THE NORTHERN SHORE OF THAT RIVER.

Ohio, in its proposed amended complaint, contends that this Court has never been asked to determine the location of the boundary line between Kentucky and Ohio.

While it is true that this Court has never specifically considered a boundary dispute between Ohio and Kentucky, we submit that the northern boundary of Kentucky on the Ohio River has been judicially determined by this Court in *Handly's Lessee* v. *Anthony*, 18 U. S. 374 (1820), and that such determination was intended to establish not only the border line between Kentucky and Indiana on the Ohio River but also the borderlines of Ohio and Illinois, states similarly situated.

Ohio in its original complaint correctly stated that the determination of the boundary between Indiana and Kentucky "as the northerly low water mark of the Ohio River as that mark existed in 1792 should control in this dispute between Ohio and Kentucky because of the historical title relationship of the parties hereto." (C 12) (Emphasis added.)

The Special Master accurately answered this contention when he stated at pages 11 and 12 of his Report:

> "In addition, Ohio's assertion that these decisions were intended to locate the northern boundary of Kentucky on the Ohio River only as between Indiana

This judicial significance of the *Handly* decision is that the boundary along the State of Kentucky was established as extending to the low water mark on the north shore, and thus, the Court clearly and unanimously defined the entire northern boundary which encompasses the States of Illinois and Ohio. This Report correctly so held at page 12.

Even before this Court's decision in *Handly*, and ever since, Kentucky, through its legislative and judicial pronouncements, has always openly asserted dominion and control over the Ohio River to the low water mark on the northern shore. She has done so for over 150 years with no formal objection from the State of Ohio (see Rep pp. 6-8).

However, Ohio now claims that she has not acquiesced in the *Handly* decision as the Report of the Special Master so held. This argument apparently has its basis in the fact that Ohio was not a party to the decisions involving the boundary dispute and that the cases relied upon by the Special Master do not support such a proposition. (See p. 4, Brief in Opposition).

Moreover, in the words of the Special Master:

> "The acceptance by the Ohio courts of the Supreme Court's decisions in *Handly* and *Indiana v. Kentucky* setting the boundary of Kentucky at the low water mark on the northern shore undermines its contention that it is not bound by them because they involved conflicts between Indiana and Kentucky wherein Ohio was not a party. . . . At the very least, Ohio was put on notice of the practical intent and consequences of these decisions and the jeopardy they posed to its claim of dominion on the River."

Although Ohio has attempted to distinguish the three cases cited in the Report for the proposition that Ohio's highest courts have acquiesced in the boundary, she has not squarely faced the critical aspect of these cases. In no way has Ohio overcome the language of its highest court in *Lessee of McCullock v. Allen*,

CONCLUSION

For the foregoing reasons we submit that the Report of the Special Master filed May 15, 1972 was entirely correct and its recommendation, that an order be entered denying the Petition to Amend the Complaint of the State of Ohio, should be adopted by this Court.

Respectfully submitted,

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